NO. 90-1590

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

JOSEPH W. KOSSEFF PETITIONER

VS.

UNITED STATES OF AMERICA RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH JUDICIAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a 1977 appellate brief which had not been entered into evidence nor noted on the docket sheet as having been filed was properly before the lower Court or was properly a part of the record on appeal.

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Title 28 USC section 1254(1)
FRAP 10(a)

NO._____

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OPINION BELOW

The United States Magistrate for the Central District of California issued his recommendations denying the Petitioner's motion for Coram Nobis relief holding Petitioner had failed to demonstrate that his trial counsel was ineffective under the standard enunciated in Strickland v. Washington, 406 U.S. 668, 104 S.Ct. 2052 (1984). The District Court for the Central District of California adopted the Magistrate's findings and entered the order denying the requested relief.

The Ninth Circuit Court of Appeals issued its opinion on January 29, 1991, denying the Appellant's motion to strike Appellee's brief and affirming the opinion and order of the District Court. This opinion was not rendered for publication. A copy of this opinion may be found in the appendix.

STATEMENT OF JURISDICTION

Jurisdiction for this petition is based on Title 28 USC section 1254(1).

The opinion of the Ninth Circuit Court of Appeals sought to be reviewed was entered on January 29, 1991. Petitioner's motion for an extension of time within which to file a petition for rehearing was denied on February 27, 1991.

This petition, having been filed within 60 days of the date of the decision of

the Ninth Circuit Court of Appeals, is therefore timely.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy. . .to be confronted with the witnesses against him. . . .

The Fourteenth Amendment to the United States Constitution states:

> . . .nor shall any state deprive any person of life, liberty or property, without due process of law

NINTH CIRCUIT RULE INVOLVED

Contents of the record on appeal, pursuant to FRAP 10(a) the complete record on appeal consists of:

(a) the official transcript of oral proceedings before the District Court

("transcript"), if there is one, and (b) the District Court Clerk's record of original pleadings, exhibits and other papers filed with the District Court ("Clerk's record.")

FEDERAL RULE OF APPELLATE PROCEDURE INVOLVED

Rule 10(e) Correction or modification of record. If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that Court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the Court of Appeals, or the Court of Appeals, on proper suggestion or of its own

initiative, may direct that the omission or misstatement be corrected, and if necessary, that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the Court of Appeals.

STATEMENT OF THE CASE

This case originally arose when the Petitioner was indicted by a Federal Grand Jury for his participation in an alleged mail fraud scheme. The Petitioner's original trial lasted for eight weeks after which a Federal jury convicted this Petitioner on all counts. He was sentenced to five years in prison. The direct appeal of this conviction was affirmed on October 18, 1975.

Thereafter, on October 6, 1982, the Petitioner filed a Petition for Writ of

Habeas Corpus. The basis for this Petition was the ineffective assistance of his trial counsel. Because the Petitioner had completed the service of his sentence by this time, the Court treated this Petition as one for a writ of error coram nobis.

The United States Magistrate for the Central District of California found on this original proceeding that the Petitioner had not met his burden of proof and recommended a dismissal of the Petition. The District Court entered an order dismissing the Petition.

An appeal was filed to the United States Court of Appeals for the Ninth Circuit. That Court found that "an evidentiary hearing should have been granted on an por-

tion of Kosseff's ineffective assistance of counsel claim." The key portion of this allegation was that the Petitioner's trial counsel had failed to secure the presence of a crucial witness, Richard I. Donner, the corporate counsel for the Petitioner's business. The Ninth Circuit Court of Appeals remanded the case for an evidentiary hearing to determine under Strickland v. Washington, 406 U.S. 668, 104 S.Ct. 2052 (1984) whether the Petitioner received effective assistance of counsel at his trial.

An evidentiary hearing was held on June 13, 1986. The Petitioner, Donner, Robert Talcott, the Petitioner's trial counsel and Mr. Talcott's co-counsel all were present and testified at the evidentiary hearing.

Only scant portions of the original trial transcripts were able to be located as the District Court had apparently destroyed the record from Petitioner's original case. The United States attempted to rely on its original appellee brief filed in the 1976 appeal as a basis for its interpretation and reconstruction of the trial transcripts and/or record. This document was never formally introduced into evidence nor is it listed in the docket sheet as having been filed with the Clerk of the District Court.

The Magistrate based his recommendation largely in part on the evidence adduced from this decade old document. Petitioner filed exceptions which resulted in the Magistrate filing a supplemental recommenda-

tion clarifying that he was relying on the 1976 appellate brief. The United States District Court for the Central District of California adopted the Magistrate's recommendations and relied upon the representations of the 1976 appellate brief.

On appeal the Respondent again referred to various portions of the 1976 appellee's brief in the prior related criminal proceeding. The Petitioner filed a motion to strike Respondent's brief to the Ninth Circuit on the basis that the document referenced therein was not properly introduced as evidence or even before the Magistrate in the Court below. The Ninth Circuit Court of Appeals denied this motion finding that, although the document was "neither formally entered into evidence nor noted on the docket sheet," it would nonetheless be

considered by the Court because remanding the case for another evidentiary hearing as was suggested by Petitioner would not be an efficient use of judicial resources. (See Ninth Circuit Opinion, page 3). (Contained in the Appendix).

However, counsel was prejudiced in that the documents author, the former Assistant United States Attorney who submitted the 1976 document, was not present for cross-examination on the conclusions generated by his appellate brief. The brief itself did not contain copies of the trial transcripts, but merely made statements which constituted an interpretation of the trial testimony. This 1976 appellee's brief was in essence merely the arguments of the United States Attorney.

Turning to the merits of the Petitioner's claim, it was alleged that the failure to call Richard Donner as a witness demonstrated that the Petitioner was denied the effective assistance of counsel.

Petitioner argued on appeal that the 8 specific misrepresentations alleged by the government to have been committed in 1976 could have been effectively combated had Petitioner's corporate counsel, Richard Donner, testified. It was also alleged that the reason that Petitioner's trial counsel did not call Donner as a witness was that he failed to obtain a release from the corporation's bankruptcy trustee. Without that release, Donner who had invoked the attorney/client privilege when originally

called before the Grand Jury by the United States Attorney, would not have been able to testify.

Petitioner's corporation was involved in a franchising arrangement for "mini theaters." Mini theaters are movie theaters with a seating capacity of less than 300 people. The government alleged 8 specific misrepresentations in the sale and promotion of these mini theater franchises.

During the evidentiary hearing the Petitioner presented his corporate counsel, Richard Donner, who testified in a manner which was sufficient to rebut the allegations raised by the prosecution in the original trial and which would have negated the intent element necessary for a mail fraud conviction.

The United States then countered with the allegations contained in the original 1976 appellate brief which allegedly rebutted the Petitioner's contention that Donner's testimony would have been exculpatory at the original trial.

This original 1976 appellate brief should not have been considered by the Court below because it was not properly admitted into evidence, it lacked a proper foundation for its admission and further, it was hearsay.

ARGUMENT

THE NINTH CIRCUIT COURT OF APPEALS ERRED IN CONSIDERING EVIDENCE WHICH HAD NOT BEEN INTRODUCED IN THE COURT BELOW IN DISREGARD OF ESTABLISHED PRECEDENT FROM OTHER FEDERAL CIRCUIT COURTS OF APPEAL

The error of the Ninth Circuit Court of Appeals in affirming the decision of the United States District Court for the Central District of California was so substantial and in such conflict with the Federal Rules of Appellate Procedure and the decisions of other Circuits which have addressed the issue as to justify this Court in issuing its Writ of Certiorari.

Despite the fact that the 1976 appellate brief of the government was never formally entered into evidence nor noted on the docket sheet, the Ninth Circuit Court of Appeals considered it a part of the record. (See Ninth Circuit Opinion at page 3). The Petitioner was denied the exercise of his right to confront the evidence against him by the manner in which this 10 year old brief was used by the various courts below. This

brief was never seen by Petitioner's current counsel until it was used at the hearing to refresh a witnesses' recollection. Petitioner was ambushed by this tactic and was com.PA pletely unable to attack the statements of counsel contained in the brief.

This case is not unlike U.S. v. Glass, 744 F.2d 460 (5th Cir. 1984) where, on a denial of the government's petition for rehearing, the Court, per curiam, held that a sealed affidavit which was never introduced into evidence at a suppression hearing could not be made a part of the record on appeal.

The Court also noted that permitting the Affidavit to supplement the record would cause substantial prejudice to the Defendant who would be unable to cross-exam-

1. No copies of the original transcripts of the Petitioner's trial were attached to this brief. Only the arguments and interpretations of the Assistant United States Attorney who authorized that document. That Assistant United States Attorney did not testify at the evidentiary hearing.

ine the affiant on the document if it was permitted to supplement the record on appeal.

Similarly this Petitioner and his out of state counsel were unable to adequately review the 1976 appellate brief and cross-examine the various witnesses who testified as to matters referred to in that document.

Both the First and Third judicial circuits have addressed the issue raised in this petition and reached conclusions opposite of the Ninth Circuit. Evidence not admitted into the record may not be considered on appeal.

In U.S. v. Gonsalves, 735 F.2d 638 (1st Cir. 1984) the Court held that "undocketed ex parte submissions to the Court, undocketed letters between counsel, and handwritten notes from the notebook of the

District Court's deputy clerk" could not be considered a part of the record on appeal. The Court flatly held it would disregard such quasi-evidence.

In U.S. v. Donsky, 825 F.2d 746 (3rd Cir. 1987) the Court similarly refused to consider "evidence" referenced in a District Court brief because it was not actually filed of record. The Third Circuit stated quite plainly "it is elementary that this Court cannot consider any material that is not part of the record." U.S. ex rel Bradshaw v. Alldredge, 432 F.2d 1248 (3rd Cir. 1970). The Court ordered the proponent to designate the page and date where such evidence could be found in the record. The proponents of the evidence, which happened to be Grand Jury transcripts, designated certain

District Court briefs which were not actually filed of record. The Court declined to consider those portions of the appellate briefs which were dehors record evidence.

The Ninth Circuit erred in finding that the 1976 appellate brief was a part of the record. It was not filed of record and therefore should not have been considered a part of the record.

Perhaps the most direct case on point with the facts of this situation is U.S. ex rel Collins v. Ashe, 176 F.2d 606 (3rd Cir. 1949). That Court held that an appeals court could not base its opinion on "evidence" not formally made a part of the record even if said "evidence" had been informally offered to and read by the trial Court.

Collins was an habeas corpus case which had previously been remanded by the Third Circuit for an evidentiary hearing. After the trial Court denied the writ an appeal ensued. Certain documents were tendered to the Court below but were not marked as evidence nor received into evidence. On appeal the documents were sent up to the Court of Appeals not as part of the certified record, but rather informally with a simple cover letter from the Clerk of the trial Court.

The Court held:

> It is so well established as not to require discussion, however, that a district court of the United States must base its decision on evidence actually in the record of the case and that an appellate tribunal cannot base an adjudication on items of evidence informally offered to the trial Court, and, though apparently read by it, not made part of the record.

Id. at 607

Counsel does not concede that the decade old document was even admissible as evidence. When it became apparent the Magistrate was relying on the 1976 brief the Petitioner objected to this miscarriage of justice in his written objections to the Magistrate's Findings of Fact.

The major portions of the 1976 brief cited by the government in its appellate brief came from the argument portion of the brief. As this Court no doubt recognizes the author of that document had not been sworn as a witness which ordinarily is a requirement prior to testimony being admitted into evidence. The unsworn representations of a prosecutor cannot be permitted to substitute for evidence. U.S. v. Underwood, 577 F.2d 157 (1st Cir. 1978).

In reviewing the transcript of the evidentiary hearing held in the trial Court, the 1976 appellate brief was "furnished" to the Court and said document was use by the Magistrate as a basis for his opinion. See supplemental proposed findings on a Petition for Writ of Error Coram Nobis at page 2). The document was never formally introduced into the record nor was there any foundation ever established for its admissibility. It was apparently furnished ex parte to the Court.

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2. This document is not referenced on the docket sheet although it appears to have been filed on December 7, 1988. If it was never formally filed of record with the Clerk's office, it should not have been considered by the Courts below either.

Had a proper foundation been laid for the introduction of this brief, counsel would have been able to attack the veracity of the statements made in that appellate brief. Without that opportunity the Magistrate's reliance on the decade old brief substantially prejudiced the Defendant.

This appellate brief was not the best evidence of the testimony at the original trial. The United States itself noted at the evidentiary hearing that "the best evidence would be the trial transcript itself." The Petitioner should not be made to suffer prejudice because the original trial transcripts were lost through no fault of his own. It is improper to permit the government to bolster its cause by using a 1976 appel-

late brief which was not subject to cross-examination nor properly admitted into evidence.

CONCLUSION

Wherefore for all the foregoing reasons counsel prays that this Court issue its Writ of Certiorari in this cause.

Respectfully submitted,

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APPENDIX

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CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSEPH W. KOSSEFF)) Petitioner)) VS.)) UNITED STATES OF) AMERICA) Respondent(s)	NO. CV82-5187-LEW(K) FINDINGS ON A PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN FEDERAL CUSTODY

These findings are submitted to the United States District Judge pursuant to the provisions of 28 U.S.C. section 636 and General Order 194 of the United States District Court for the Central District of California.

On October 6, 1982, petitioner, a former federal prisoner, filed a petition for

writ of habeas corpus by counsel in forma pauperis, pursuant to 28 U.S.C. section 1915(a).

The matter was presented on this Court's form for a motion pursuant to 28 U.S.C. section 2255. It was referred to the sentencing Judge, who indicated it should be handled as a petition for writ of habeas corpus.

The Magistrate issued an order to show cause and a motion to dismiss was filed on December 17, 1982. Petitioner filed a response, and after considering the matter, the Court found that it could not be treated pursuant to 28 U.S.C. section 2241 or 2255, because the Petitioner was no longer in "custody" at the time the petition was filed. Petitioner's request that the matter be

treated as a petition for a writ of coram nobis was granted and a further response was ordered. 28 U.S.C. section 1651(a); United States v. Morgan, 346 U.S. 502 (1954).

Opposition pleadings were filed, Petitioner filed a supplemental pleading and the matter was thereafter submitted. After considering the allegations, the Magistrate found that the Petitioner "has not sustained his burden of showing that the extraordinary remedy of coram nobis should issue, nor has he shown that he is entitled to relief pursuant to 28 U.S.C. section 2255."

After considering Petitioner's objections, the Court entered an order dismissing the petition on October 13, 1983.

Petitioner appealed and, in a memorandum filed on June 28, 985, the Ninth

Circuit affirmed in part and vacated an remanded in part.

The Court of Appeals found "that an evidentiary hearing should have been granted on a portion of Kosseff's ineffective assistance of counsel claim." (Memo. p.2) Specifically, the Court found that the portion of Petitioner's ineffective assistance of counsel claim which alleged that his attorney "failed to obtain and assure the presence of an allegedly crucial witness, Richard I. Donner," who it was alleged "was quite familiar with UGT-FMS corporate matters, and could have explained the various transactions was not adequately dealt with in the record." (Memo., pp. 2-3) It stated that Donner's affidavit, which is part of the record, indicated that he "re-

flected a clear understanding of the inner workings of the various corporations involved in the criminal charges, and offered legitimate corporate considerations to explain the 'how and why' of the varied transactions which the government claimed were essential to the conspiracy and mail fraud charges."

It was found that the "relevant question is whether the absence of Donner's testimony may reasonably have effected the outcome of this case." (Memo. p. 3)

The matter was remanded for an evidentiary hearing to determine "first, whether the failure to call Donner prejudiced Kosseff, and, if so, whether the failure violated Kosseff's Sixth Amendment right to effective assistance of counsel."

It was also found that "we do not, at this time decide whether Kosseff must justify his delay in seeking coram nobis relief, but allow him to amend his petition to do so. . . . The district court may then pass upon this issue also." (Memo p. 4)

Upon remand, Petitioner was granted 30 days in which to file an amended petition and a request for an evidentiary hearing. On January 2, 1986, he did so. On January 13, the government filed a response and on April 29, 1986, the Court ordered an evidentiary hearing on all issues remanded.

The evidentiary hearing was held on June 13, 1986. Testimony was taken from Michael Sobel, Joseph W. Kosseff, Robert M. Talcott, and Richard I. Donner, after which, the matter was recessed subject to being

reopened at the request of the parties within 60 days for further proceedings. Petitioner was given permission to supplement the record and to place the matter back on calendar upon notice. Counsel were to submit portions of the trial transcripts, subject to review by the opposing party.

On December 9, 1986, there having been no submission or request by either party since the Court's order of June 13th, the matter was submitted on the pleadings and exhibits as well as the testimony presented.

The Magistrate has reviewed the entire record as well as the record of the evidentiary hearing, and the exhibits submitted and makes the following findings.1

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1. The complete trial transcript is no longer available. Reference will be made to portions supplied by the parties.

Petitioner and his co-defendant Warshauer devised and executed a plan to sell franchises and regional directorships in a chain of movie "mini-theaters" through an entity called UGT. During the two and a half year period covered by the indictment from June 1, 1970 to December 31, 1972, they were paid millions of dollars in return for franchises.

As the result of this activity the defendant was indicted and charged with 23 counts of mail fraud (18 U.S.C. section 1341) as well as one count of conspiracy to commit mail fraud. (18 U.S.C. section 371). It was charged that they made or caused others to make numerous materially false and misleading representations, which were included in newspaper ads and sales materials used to

promote the plan, either with full knowledge that they were false or with a reckless indifference to the truth. The government withdrew 7 of the substantive counts of mail fraud at the conclusion of its direct case. The mailings charged in the remaining 16 counts were of license, regional directorship agreements, directorships, and financial statements as well as documents. Petitioner was convicted of all counts and received a prison sentence on November 24, 1975. (CR 75-683-LTL).

The bulk of the evidence presented consisted of proof of representations set forth in sales presentations and materials disseminated by both of the defendants and by others at their direction, coupled with proof of their falsity.

There were eight principle presentations designed to induce person to invest in UGT Franchises and/or Regional Directorships.

At trial it was established that it had been represented that every picture to be shown in UGT Theatres would receive the prior approval of a film advisory committee, established by and for UGT and composed of celebrities from the motion picture industry. It was proven that UGT never held any actual screenings for the committee and merely sent the stars a few lists of films available for showing, only one of which was ever returned.

Second, it was represented that a move celebrity had personally bought licenses to operate four UGT mini-theatres in California. This was shown not to be true.

Next, it was represented that, during 1969 and 1970, several pilot theatres, which were named, had been profitably operated by or on behalf of UGT and that, therefore, UGT had a proven track record.

Records alleged to be of gross receipts of individual pilot theatres were presented to potential investors. Facts were developed at trial that neither UGT nor its corporate parent nor anyone else acting on their behalf had ever built, owned, or operated any of the so-called pilot theatres and that the gross receipt figures presented were fabricated and did not reflect reality for the theatres named.

Next, it was told that UGT Theatres would be fully automated. Both defendants

testified that they had never seen a theatre with full automation that worked properly, that they did not know of any bona fide factual basis for the representations concerning full automation that were made to prospective investors and that full automation had never been delivered to UGT Franchises as promised.

It was represented that UGT would book all the films to be shown in these franchise mini theatres, thereby, obtaining substantial savings in film rentals.

Franchises were told that good quality 16mm prints were widely available for many recent films. Evidence proved that UGT had no realistic plan or hope to effectuate these promises and that both defendants had been so advised.

Finally, it was represented that UGT and its affiliates would themselves produce numerous new motion pictures which were to be offered to the mini-theatres on a first run basis at a reasonable charge. These pictures were represented to be in production and fully funded. Petitioner admitted in cross examination at the time he made such representations, UGT had no films that had started shooting and, at most, only outline scripts that had been received. He had no idea whether or not proposed pictures were fully funded and had made no independent investigation to determine the true situation.

The evidence further indicated that, during the period covered by the in-

dictment, the defendants sold 232 mini-theatre franchises and 55 regional directorships for which they received $5,195,000 and that, in addition, the victims incurred long-term theatre site and leasehold obligations in an amount exceeding $17,000,000.

The uncontradicted evidence established that the defendants used the mails for a variety of purposes necessary to the success of the plan. They were employed to send franchise and regional directorship agreements and to otherwise communicate with franchisees. The evidnece indicated that these communications were sent through the mails at Petitioner's direction.

The essence of the charge was that Petitioner and his co-defendnat induced people to invest in UGT by making false and

fraudulent representations through the mails. The fact that UGT's busienss ultimately failed and that the "mini-theatre concept" was a bad idea to begin with was not a material element of the offenses charged.

At the heairng, the issue of excusable delya was considered first. After hearing testimony, the Court found excusable delay.

Petitioner was then called sworn and testified on the issue of effective counsel. He testified that he was the President of Franchise Marketing Service (FMS). In 1971 he incorproated United General Theatres (UGT) with himself as President. After consulting with Mr. Donner, his attorney, and being advised tht he was liable for suit by minority stockholders for a

donation of FMS stock to UGT, it was agreed that UGT and FMS would enter into a joint venture. In order to accomplish this a portion of the income from UGT was allotted to FMS in return for the latter's agreement to pay all overhead expenses and the arrangement and the amount were subsequently retroactively adjusted and back dated.

There was also a planned merger with a "shell" corporation that had just come out of Chapter Eleven in the bankruptcy court. Mr. Donner knew all of the details.

Petitioner testified that in order to show fraudulent intent the government made an issue of this procedure at trial and during closing argument and that he had advised his attorney that Mr. Donner was an important witness since in everyting Peti-

tioner did he sought and followed Mr. Donner's legal advice. He further testified that Mr. Donner assisted in the operation of UGT and conducted an investigation of its operation so that he was thoroughly familiar with it. It was a "due dilligence" investigation and he gave UGT a "clean bill of health." There was no one else who could have given this information to the trial he stated that jury. Donner was also aware of the problems with the projection system and knew that a viable one was in existence.

Petitioner testified that Donner also advised on advertising material and solicitatiion and his advice was always followed. Advertising and solicitation were a substantial part of the government's case. Again, Donner was the only witness to these

conversations wherein he advsied Petitioner. In Petitioner's opinion, Donner was his most important witness.

Petitioner stated that he could and would not take part in the day-to-day operation of UGT, since he was totally unfamiliar with the motion pictur business. His expertise was in marketing. He was advised by Mr. Donner, that he had to head the combination and that, as head of UGT, he could not pay himself a commission for marketing, even if he formed a separate marketing division. As a result of this advice, he became involved in the daily operations of UGT. He also discussed his compensation with Mr. Donner, who advised him to "make sure it was fair." Kosseff testified that Donner was the only witness to these conversations.

Donner also hadknowledge of the "accounting matter."

Finally, Petitioner alleged that, after his indictment, he spoke to Mr. Talcott, his attorney regarding calling Mr. Donner as a witness, advising him of the above. In order to testify Mr. Donner required a release from the trustee in bankruptcy. Petitioner first learned that no release had been procured on the date that Donner was to testify. He was told that his attorney had sought a release, but was unable to get one and that, when he sought one from the trial judge, it was denied. Mr. Donner would not testify.

Mr. Talcott, Petitioner's trial attorney, was called sworn and testiified that he had discussed Mr. Donner with

Petitioner prior to trial and that he was on a list of suggested witnesses. He went on to state that he never felt that Mr. Donner's testimony was very material even though Mr. Kosseff, whom he felt was very cooperative, seemed to think so. Thirty subpoenas had been issued although they did not call that many witnesses. He needed the Court's authoriity for out of state witnesses such as Donner and had secured it. Trial went on for about 8 weeks and almost 60 witnesses testified.

Mr. Talcott stated that the material element of the case was Mr. Kosseff's misrepresentations to buyers through the mail and that, therefore, hsi other business practices, which might be validated by Mr. Donner, were really n ot relevant. The

defense was that there was no intent to defraud when misrepresentations were made bo buyers via the mail.

He stated that he had made a strategic decision not to call Mr. Donner. That, rather than the failure to secure a waiver, was the sole reason he was not called.

Talcott testified that he did not consider Donner's testimony at all critical. He indicated that Donner came during the last week of an eight week trial. It was during the presentation of the defense, and trial tactics dictated not overloading the jury at this point with redundant witnesses whose testimony was not really material.

The final witness at the hearing was Mr. Donner. He testified he had assisted

the Petitioner in the formation and conduct of his business. He went on to testify that when he came to Los ANgeles, he told Mr. Talcott what his testimony would be, but that Talcott indicated that the United States Attorney wouldn't allow the Trustee to sign a waiver and therfore he couldn't be placed on the stand and he was excused.

On cross-examination, Mr. Donner admitted that he knew nothing about the allegedly false misrepresentations. It was also developed that his testimony might be misreprentations. It was also developed that his testimony might be misinterpreted by the jury to reflect on the defendant, since he testified that on several occasions he advised the Petitioner against doing things that Petitioner had proposed to do.

In the original petition, it was alleged that conflicting financial statements for the years 1971 and 1972 and the attempts of the corporations to merge were a major part of the government's case against Petitioner in an attempt to depict him as "sinister and corrupt." Petitioner further alleged that, while his accountant testified as to the mechanics of these transactions, he [Petitioner], had "virtually no knowledge of the underlying motivation for the procedures utilized" and that in this regard "the testimony of Richard I. Donner, a New York attorney, was crucial to explain and refute the various allegations that the government directed against Kosseff's legitimate business transactions." It was argued that

defense counsel's failure to call Mr. Donner deprived Petitioner of a crucial witness "with intimate knowledge of the various transactions" preventing him from testifying for the defense. (Petn. Memo, p.10)

This Court informed the parties that it would order such records as still existed of the trial of the case-in-chief. The United States Attorney represented that he had sought them and believed they had been destroyed. Mr. Kosseff's attorney requesting additional time in which to make more submissions, and the matter was recessed. As indicated above, no additional material was presented. The Magistrate has been unable to reconstruct the trial itself. The transcript is apparently unavailable. Neither party has been able to produce it.

In order to prevail, Petitioner must show that counsel's performance was deficient and that this deficiency so prejudiiced him as to deprive him of a fair trial. Strickland v. Washington, 466 U.S. 668 (1984). Even though counsel may have been deficient, if no prejudice is shown, there is no basis for this Court to set aside the conviction.

Coram nobis is an extraordinary remedy and should be granted "only under circumstances compelling such action to achieve justice." United States v. Morgan, 346 U.S. 502 (1954). The burden is on the defendant to prove that the writ should issue. Coram nobis is a collateral attack and is limited in scope, existing only to

correct those matters wherien "the errors were of the most fundamentla character. . . such as rendered the proceeding itself irregular and invalid." United States v. Addonizio, 442 U.S. 178 (1979).

Defendants were charged with furthering a scheme by making false representations thorugh the mail. The fact that they adhered to advice of counsel in setting up their organization would appear to be immaterial to the charged offense. They were not charged with a scheme with intent to defraud but rather with the fraudulent sale of that scheme. The witness, Donner, had no connection with this aspect of the business.

"In a prosecution of this type, the government is not required to prove that anyone was defrauded or that anyone sustained a loss." Fineberg v. United States, 393 F.2d

417 (9th Cir. 1968) nor does the mail fraud statute impose on the government the requirement to prove that the victims awere misled by or relied upon the fraudulent misrepresentations. United States v. Goldberg, 455 F.2d 479 (9th Cir.), cert. denied, 406 U.S. 967 (1972). The essence of the offense is the use of the mails for obtaining property by means of false "pretences, representations or promises. . . ." (18 U.S.C. section 1341)

The test of a fraudulent representation is how it appears to the average person. Lustiger v. United States, 386 F.2d 132 (9th Cir.) cert. denied, 390 U.S. 951 (1968).

It is true that the mail fruad statute does not reach mere expressions of opinion, loose sales talk or "puffing."

Lustiger, 386 F.2d at 138. However, the representations detailed above were beyond mere expressions of opinion or slight exaggeration, they were factual statements, either wholly false or made in reckless disregard of the truth.

With regard to the conspiracy, its existence need not be proved directly, but may be inferred from circumstantial evidence. Glasser v. United States, 315 U.S. 60 (1942). The evidence at trial was replete with proof that the defendants began the UGT Enterprises as partners and that they both participated in the making of the false statements.

From the above, it is clear that Petitioner's claim that Mr. Donner was "an essetntial defense witness" is without meriit. Mr. Donner testified that he had no

connection with the misrepresentations in questions, nor with the use of the mails. The fact that he may have had an intimate knowledge of the workings of the company and may have been able to show that it was essentially a legitimate operation, is immaterial, since that is not the issue as relates to the offenses charged. The issue was not the legitimacy of the underlying operation, but the manner in which it was represented and sold. The evidence was clear that this was accomplished by fraudulent means.

The evidence presented at the hearing indicated that Mr. Donner's testimony was not material to the real issue before the Court. Petitioner has failed to sustain his burden of proving that action by his counsel was so deficient as to prejudice him to the

extent that it deprived him of a fair trial.

The Magistrate finds that the failure to call Mr. Donner as a witness for the defense did not so prejudice Petitioner as to violate his sixth amendment right to effective assistance of counsel.

The Magistrate finds that the extraordinary remedy of coram nobis should not issue and that Petitioner is not entitled to relief pursuant to 28 U.S.C. section 2255.

IT IS THEREFORE RECOMMENDED that an Order be issued by this Court denying the petition and dismissing the action.

DATED: This 30th day of September, 1988.

/S/JOHN R. KRONENBERG
United States Magistrate

FILED
DEC 7, 1988
CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSEPH W. KOSSEFF	NO. CV82-5187-LEW(K)
Petitioner	SUPPLEMENTAL PROPOSED FINDINGS ON A PETITION FOR WRIT OF CORAM NOBIS
V.	
UNITED STATES OF AMERICA	
Respondents	

These findings are submitted to the United States District Judge pursuant to the provisions of 28 U.S.C. section 636 and General Order 194 of the United States District Court for the Central District of California.

On September 30, 1988, the Magistrate filed his findings in the above

matter. On November 9, the plaintiff filed his objections. Thiis Supplemental Report is submitted for clarification and in support of the Magistrate's original recommendation.

Petitioner complains that the Magiostrate states that he "has reviewed the entire record" and point out that the trial transcripts are no longer available, and therefore a reveiw of that "record" is no longer possible.

Petitioner is correct, and the Magistrate so indicated (Findings, p. 4, n. 1). However, under the circumstances of this action, the Magistrate adopted the suggestion presented in Townsend v. Sain, 372 U.S. 293, 319 (1962), wherein similar relief is sought in habeas corpus. "A District Court sitting in habeas corpus clearly has the power to

compel production of the complete state-court record. Ordinarily such a record -- including the transcript of testimony (or if unavailable, some adequate substitute, such as a narrative record), the pleadings, court opinions, and other pertinent documents -- is indispensable to determine whether the habeas applicant received a full and fair state court evidentiary hearing resulting in reliable findings." The Magistrate reviewed the record as presented to the United States Court of Appeals for the Niinth Circuit in the appellee's brief, filed March 2, and the appellant's brief, filed March 17, 1977. This latter contains a complete summary of all of the trial testimony. Based upon the references and citations to the transcriopt made in these briefs, the Magistrate has

reconstructed the trial record insofar as possible. This record, as reconstructed, as well as all of the other evidence presetned in this matter, is the basis of the decision.

Copies of both of these briefs have been placed in evidence in the present actiion.

It is significant that after the briefs were filed, the matter was submitted without oral argument. At no time did peittioner attempt to contradict representations made by the government as to the contents of the trial transcript.

Insofar as the findings of fact and conclusions of law filed September 30, 1988, appear to indicate otherwise bthey are to be considered superseded and corrected by tehse amended findings.

Petitioner has failed to sustain his burden of showing that counsel's performance was so deficient as to prejudiice his case, and that the Writ of Coram Nobis should issue. The Magistrate adheres to his original findings.

IT IS THEREFORE RECOMMENDED that an Order and Judgment be entered by this Court denying the petition and dismissing the action.

DATED: December 7, 1988.

/s/ JOHN R. KRONENBERG
United States Magistrate

FILED
Dec 19, 1988
Clerk, U.S. District Court
Central District of California

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSEPH W. KOSSEFF, Petitioner	)	NO. CV82-5187-LEW(K)
vs.	)	JUDGMENT
UNITED STATES OF AMERICA, Respondents	)	

IT IS ADJUDGED that the petition is dismissed. DATED: This 19th day of December, 1988.

/s/ LAUGHLIN E. WATERS
United States District Judge

FILED
Dec 19, 1988
Clerk, U.S. District Court
Central District of California

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSEPH W. KOSSEFF	)	NO. CV82-5187-LEW(K)
	)	
Petitioner	)	
	)	
v.	)	ORDER
	)	
UNITED STATES OF AMERICA	)	
	)	
	)	
Respondents	)	

Pursuant to 28 U.S.C. section 636, the Court has reviewed the record, the pleadings, the findings of the United States Magistrate, and the objections and concurs with and adopts those findings.

Each party will bear its own costs.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve a copy of the

Judgment, of this Order and of the findings of the United States Magistrate by United States mail upon counsel of record for both parties.

DATED: This 19th day of Dec, 1988.

/s/ LAUGHLIN E. WATERS
United States District Judge

FILED
JAN 29, 1991
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH W. KOSSEFF Petitioner Appellant v. UNITED STATES OF AMERICA Respondent Appellee	NO. 89-55097 D.C. CV82-5187-LEW MEMORANDUM*

Appeal from
the United States District Court
for the Central District of California
Laughlin E. Waters, District Judge, Presiding

Argued and Submitted July 12, 1990
Pasadena, California

Before: REINHARDT and HALL, Circuit Judges
and RE**Chief Judge

Joseph Kosseff appeals the district court's denial after an evidentiary hearing of his petition for a common law writ of error coram nobis. We have jurisdiction under 28 U.S.C. section 1291 and affirm.

I

As a preliminary matter we must discuss the record before us. Kosseff has moved to strike the government's 1977 appellate brief from the record on appeal, arguing

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Edward D. Re, Chief Judge, United States Court of International Trade, sitting by designation.

that it was not properly before the Magistrate. We deny his motion.

The first question we address is whether the brief was ever submitted for the Magistrate's consideration. Contrary to Kosseff's assertions in his brief and at oral argument, the transcript of the evidentiary hearing makes patently clear that the government's brief was filed with the Magistrate during the course of the hearing. In fact, not only was the brief used by the government to refresh the recollection of a witness, Reporter's Transcript ("R.T.") 6/13/86, afternoon session, 19-21, but the fact that it had been filed with the court was expressly noted by the Magistrate:

> The government has today filed a copy of its's [sic] brief before the United States Court of Appeals for the Ninth Circuit. I understand that's what you're referring to, counsel?

Id. at 20. The transcript also reveals that the Magistrate stated his intent to rely on the materials filed during the evidentiary hearing (which would have included the government's brief),1 as well as any other records he was able to recover.2 Given this

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1. "I gather that we are not going to reconstruct the trial transcript. We have reconstructed the trial to some extent in the material file[d] here and in the testimony before us." R.T. 6/12/86, afternoon session, 147.

2. "Now, the court will call for such files as exist. . . .

I'm also going to try to get the entire records, the complete, the whole bit. All the affidavits, see just how they line up." Id. at 147-150.

record, we conclude that the government's brief was offered at the evidentiary hearing, that Kosseff had notice of that fact, and that it was therefore properly considered by the Magistrate.3

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3. Despite Kosseff's professed astonishment at the Magistrate's use of the government's brief, his conduct lends support to our conclusion that the brief was properly before the Magistrate. Although Kosseff complained generally about the Magistrate's reconstruction of the record in his original written objections to the Magistrate's findings, he never once objected to the Magistrate's reliance on the government's brief. In fact, he condoned the use of "briefs. . .to guide the Magistrate in his review of the record." Petitioner's Excerpt of Record ("E.R.") at 55. After the Magistrate issued his supplemental proposed findings, which explicitly stated that he had relied on both the government's and Kosseff's appellate briefs to reconstruct the record, Kosseff made no objection. He remained silent despite the fact that two weeks elapsed between the issuance of the Magistrate's supplemental findings and their adoption by the district court. He also failed to object to the use of the govern.

The second question we must address is whether the brief may be considered part of the record on appeal. Kosseff correctly notes that it was neither formally entered into evidence nor noted on the docket sheet. It therefore technically falls outside the record on appeal as defined by Ninth Circuit Rule 10-2. We nevertheless find that the brief may properly be considered part of the record on appeal. We do so under Fed.R.App.P. 10(e), which provides in part,

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3. (cont.) ment's brief in his opening appellate brief, filed more than nine months after the Magistrate issued his supplemental proposed findings. In fact, it was only in his motion to strike the government's supplemental excerpts of record, filed more than a year after the Magistrate's supplemental findings were issued, that Kosseff first voiced his objection to the use of the brief.

"If anything material to either party is omitted from the record by error or accident. . ., the court of appeals,. . . of its own initiative, may direct that the omission or misstatement be corrected." Although we have consistently construed Rule 10(e) narrowly, given the clear evidence in the record that the government's brief was presented at the evidentiary hearing and relied upon by the Magistrate, we may employ it to amend the record on appeal. See Daly-Murphy v. Winston, 601 F.2d 348, 351 (9th Cir. 1987); United States v. Walker, 601 F.2d 1051, 1054-55 (9th Cir. 1979); see also Salinger v. Random House, Inc., 818 F.2d 252, 253 (2d Cir.) (court of appeal may supplement the record pursuant to Rule 10(e) upon showing that district court considered

evidence at issue), cert. denied, 484 U.S. 890 (1987). Doing so will "clarif[y] our understanding of the process by which the [magistrate] reached the decision challenged on appeal." Salinger, 818 F.2d at 253.

To do otherwise, and either exclude the brief or remand for yet another evidentiary hearing as Kosseff suggests, would be contrary to the interests of justice and the efficient use of judicial resources. See Dickerson v. Alabama, 667 F.2d 1364, 1369 (11th Cir.) (appellate court may, in interests of justice and efficient use of judicial resources, supplement record on appeal rather than remand to reconsider evidence not considered below), cert. denied, 459 U.S. 878 (1982). Moreover, Kosseff is in no way prejudiced by the inclusion of the brief in

the record on appeal. As the record from the evidentiary hearing makes clear, he cannot in good faith contend that he was without notice of the existence of the government's appellate brief or its contents. He has also failed to indicate how the brief was misused or in what way the Magistrate's findings were defective. There is no support for his suggestion that the Magistrate used the brief "as a substitute for the trial transcript." Rather, a review of the Magistrate's findings and the transcript of the evidentiary hearing suggest that the primary evidence upon which the Magistrate relied was the testimony given at the hearing; the brief was properly used as an aid in the reconstruction of the original trial record. We therefore deny Kosseff's motion and declare that the govern-

ment's 1977 appellate brief is part of the record on appeal.4

II

Turning to the merits, we review Kosseff's ineffective assistance of counsel claim de novo. Tinsley v. Borg, 895 F.2d 520, 531 (9th Cir. 1990). Kosseff must establish that the performance of his coun-

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4. Implicit in Kosseff's attack on the Magistrate's use of the government's appellate brief is the suggestion that the record does not support the Magistrate's findings. We disagree. The Magistrate heard testimony from Kosseff, Talcott, Sobel, and Donner, actively taking part in the questioning of those witnesses. He also reviewed the available documentary evidence. In all, Magistrate Kronenberg did a commendable job reconstructing the record from the few available extant sources. Our discussion in Part II makes clear that this evidence provides more than ample support for his findings.

sel, Robert Talcott, was deficient and that Talcotts' deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). His sole claim is that Talcott's failure to call Richard Donner constituted ineffective assistance of counsel.

We first address the parties' conflicting claims about the nature of the government's case against Kosseff, since this is a necessary prerequisite to assessing the relevance of Donner's testimony. The government asserts that its case centered upon specific misrepresentations made by Kosseff and his co-defendant to prospective purchasers of United General Theatres ("UGT") mini-theatre franchises. Kosseff, however, argues that a substantial part of the government's case against him was his alleged

misconduct in controlling and operating UGT and Franchise Marketing Service, Inc. ("FMS"), matters with which Donner was familiar. While the record is incomplete in many respects, there is substantial evidence to support the government's version. This includes the government's original indictment, which enumerated eight specific misrepresentations,5 the testimony of Talcott,6 the

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5. Petitioner's E.R. at 3-4, 10

6. R.T. 6/13/86, afternoon session, 37-40. Talcott was particularly forceful in rejecting Kosseff's version of the trial:

> This case was not revolving around the testimony of Richard Donner. Period. End of story. The allegations in the indictment, if you have read them, set forth a series of misrepresentations with [sic] Mr. Kosseff and his co-defendant were alleged to have made to prospective franchisees. That is what the gravamen of the offense was.

testimony of David Sobel, trial counsel to Kosseff's codefendant Joseph Warshauer,7 and the government's appellate brief.8 Virtually all of this evidence to the contrary other than his own testimony at the evidentiary hearing and eleven pages of the trial transcript containing his testimony about UGT and

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6. (cont.)He was not charged with embezzlement. He was not charged with mismanagement of his business relationships in private placements. He was not charged with not taking the advice of an accountant or not taking the advice of a lawyer. He was charged, as in every mail fraud and conspiracy thereof, of making gfalse, misleading representations to so-called victim witnesses, and that was the gravamen of the offense and that's what Mr. Kosseff and his counsel concentrated on, not Mr. Donner.

7. Sobel unequivocally confirmed both Talcott's testimony about the nature of the government's case against Kosseff, Id. at 68-69.

8. Respondent's E.R. at 7-9

FMS. Given that the original trial lasted eight weeks, during which sixty-seven witnesses testified, this evidence is woefully inadequate to overcome the substantial evidence supporting the government's version of the case. We therefore affirm the Magistrate's finding that the issue at trial "was not the legitimacy of the underlying operation, but the manner in which it was represented and sold."

To overcome the "strong presumption that [Talcott's] conduct [fell] within the wide range of reasonable professional assistance," Strickland, 466 U.S. at 689,9 Kosseff

9. Kosseff argues that because the trial record has been lost or destroyed we should exercise our equitable powers and abandon Strickland's presumption of effective assistance of counsel in reviewing his petition. In a coram nobis proceeding, "[i]t is presumed the proceedings were correct and the burden rests on the accused to show otherwise." United States v. Morgan, 346 U.S.

must "affirmatively prove prejudice," Id. at 693. That is, he must establish that there is a reasonable probability that had Donner testified, he would not have been found guilty of mail fraud. Id. at 694.

To obtain Kosseff's conviction for mail fraud, the government was required to prove that he (1) used the mails in interstate commerce; (2) in furtherance of a scheme to defraud; (3) with the intent to defraud. United States v. Bonnano, 852 F.2d 434, 440 (9th Cir. 1988), cert. denied, 488 U.S. 1016 (1989). Reckless disregard for truth or falsity is sufficient to sustain a mail fraud conviction. United States v.

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9. (cont.) 502, 512 (1954). Kosseff has failed to show any irregularity. We therefore reject his suggestion and apply Strickland in full.

Farris, 614 F.2d 634, 638 (9th Cir. 1979), cert. denied, 447 U.S. 926 (1980).

We have carefully reviewed the record from the evidentiary hearing and conclude that Donner was unable to any testimony that would have enabled Kosseff to refute seven of the eight fraudulent misrepresentations he was alleged to have made.10

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10. In its indictment and at trial the government alleged that Kosseff made the following fraudulent misrepresentations: (1) that UGT had been successfully and profitably operating several pilot mini-theatres; (2) that UGT had a "proven track record;" (3) that every film to be shown in a UGT mini-theatre would receive the prior approval of an existing celebrity film board; (4) that the actress Agnes Moorehead had obtained licenses for four mini-theatres; (5) that each mini-theatre would be fully automated; (6) that UGT would obtain a substantial cost savings for each franchisee by booking films

With respect to the "proven track record," Donner stated that he was unaware of UGT's representations about its "track record." R.T. 6/13/86, afternoon session, 115-16. He was likewise unaware of the existence and profitable operation of UGT pilot mini-theatres. Id. Donner's testimony that "somewhere" mini-theatres were operational, Id., at 100-01, would not have rebutted evidence that UGT falsely claimed to be operating its own pilot mini-theatres. As to the celebrity film board, Donner would have testified to his presence at a meeting at which two celebrities indicated a willingness to review films, but this testimony would not

10. (cont.) itself; (7) that good quality 16 millimeter film prints were widely available for a large number of recent, popular films; and (8) that UGT would produce a number of new motion pictures to be shown on a first-run basis in the mini-theatres..PA
have negated the government's allegation that

UGT represented to franchisees that the board actually existed and actively reviewed films. Id. at 116. Donner's testimony regarding Moorehead's investment would have actually confirmed the government's allegation that Kosseff misrepresented Moorehead's role as a franchisee; it also would have revealed that his own due diligence failed to uncover this misrepresentation. Id. at 116-17. Donners' testimony on booking was equivocal, but on the crucial issue of whether UGT had the ability to obtain block booking discounts (as it had claimed), he could not offer any dispositive testimony. Id. at 119-20. With respect to the availability of 16 millimeter films, Donner conceded that first run prints were not widely available, contrary to UGT's representations. Id. at 120-21. He also

conceded that UGT had only one motion picture in production, rather than the numerous fully funded films claimed by UGT. Id. at 121.

The only aspect of Donner's testimony that night have aided Kosseff involved the technological availability of fully automated theatres, but it was also potentially damaging. Donner testified to his "personal[] and substantial[]" involvement in negotiations with Viewlex about the operation of a fully automated theatre system. Id. at 88. He admitted, however, that he had never seen a fully automated theatre in operation. Id. at 118, that his due diligence investigation consisted of little more than several phone calls, Id. at 88-89, and that there was "an on-going controversy" over the technical capabilities of the sys-.

tem, Id., at 87. Since the original indictment alleged that Kosseff misrepresented the availability of fully automated theatres, Donner's testimony about the nature of the due diligence performed in investigating the Viewlex system (and by implication Kosseff's knowledge of the system's technical limitations) may actually have been harmful to Kosseff's defense.

Despite the largely absent trial record, having reviewed the central allegations in the government's case and the direct testimony of Talcott, Sobel, and Donner, we are in complete agreement with the Magistrate that Donner was not "an essential defense witness." We cannot say, as Strickland requires us to find, that had Donner testified there would have been a

reasonable probability that Kosseff would not have been convicted of mail fraud. We therefore affirm the Magistrate's conclusion that Kosseff failed to meet either prong of the Strickland test.

III

For all the foregoing reasons, we AFFIRM.